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# How Did We Get Here? Looking to History to Understand Conflicts in Public Land Governance Today<sup>1</sup>

Karin P. Sheldon\*

## I. INTRODUCTION

In recent years, proposals for collaborative processes that would shift the management of public land resources and activities away from federal land managers to local entities have sparked heated debate among Western communities, environmental groups, and members of the public. There are no neutral views on this subject. Professor George Coggins calls collaborative processes and devolution to local control “forms of abdication,”<sup>2</sup> and “the latest ideological fad in federal land management.”<sup>3</sup> He denounces the theory that “a self-selected group of local people who promise to be civil with one another can do a better job of allocating federal natural resources than the duly constituted federal authorities.”<sup>4</sup> Coggins emphasizes that national lands are not private lands, but rather every American’s natural heritage. Local people, he says, cannot and will not make decisions in the national interest.<sup>5</sup>

In contrast are scholars like Daniel Kemmis, who describe the collaboration movement as

an indigenous form of Western problem solving,<sup>6</sup> . . . a democratic phenomenon through which Westerners have begun to translate their land-rootedness into direct and effective control over their home ground. This movement is bringing together in a most unexpected way the Western love of powerful landscapes with the old Western strain of independence and rugged self-determination.<sup>7</sup>

Kemmis notes the widespread view that the system of governing the public lands is dysfunctional or broken, in large measure because govern-

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1. This commentary was presented at the Public Land & Resources Law Review Conference on *Public Land Governance: The Legal and Political Implications of National and Local Perspectives*, Missoula, Montana (April 12, 2002). It was adapted from *The Thrilling Days of Yesteryear: Some Comments on The Settlement of the West and the Development of Federal Land and Resource Law*, given to the ALI/ABA course on *Federal Lands in the West: Embarking on the New Millenium*, Jackson Hole, Wyoming (October 5, 2000).

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2. George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 *ECOLOGY L.Q.* 602, 610 (1999).

3. *Id.* at 603.

4. *Id.*

5. *Id.* at 609.

6. DANIEL KEMMIS, *THIS SOVEREIGN LAND* 128 (2001).

7. *Id.* at 172.

ance is centralized in Washington, D.C., and is therefore out of touch with local conditions. He argues that people who do not live in and depend on particular landscapes should not have an equal say in their governance. Local people should be recognized to have a kind of sovereignty when it comes to decisions about how the lands they live near will be managed.<sup>8</sup>

The issues involved in public land governance are complex and controversial. They arouse strong emotions because they reach to the heart of many Westerners' identity and family and community history. During the first half of the 20th century, federal land policy proceeded on the assumption that development was the primary management mission of the federal government. Public resources were transferred into private hands under very favorable arrangements, and commodity users had considerable influence on agency management. These users also enjoyed the benefits of significant subsidies. With the rise of the environmental movement in the late 1960s, expectations about public land management began to change. The new emphasis on protection and restoration of resources altered management patterns and imposed significant new regulatory constraints on commodity users. This led many to question the system of public land governance and to push for alternative arrangements that would assure continued access to resources.

Environmentalists generally oppose management alternatives that call for local control or cede management authority to entities outside of federal agencies. The primary reason for this opposition is the fact that such alternative management approaches are often fundamentally inconsistent with the laws governing the public lands. Congress directed that federal property be managed to meet the needs of the American people as a whole, not to provide revenue for local industries. Collaborative processes are regarded by many as dodges to avoid compliance with environmental regulations and to continue business as it used to be, regardless of the environmental impact.

I will leave it to others to evaluate the merits and limitations of collaborative processes and local control agreements. My goal in this commentary is to look back, so that others involved in the debate about public lands governance may look forward. I hope to shed some light on the legal and policy developments in our history that brought us to the point we are at today. If we can understand how we got here, perhaps we can use that knowledge to create new, environmentally sound decision systems for resource use and protection.

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8. *Id.* at 168.

## II. THE PUBLIC LANDS

For all sides of the governance debate, the story begins with the land. Historian Robert Bunting has said, "Land and its seemingly inexhaustible abundance stands at the heart of American history, intertwining Americans' material lives and cultural perception."<sup>9</sup> Our bountiful resources and astonishing natural beauty "framed a distinctly American character, and seemingly assured a belief that Americans were a chosen people. . ."<sup>10</sup> Americans clearly conceive of their country, in Perry Miller's apt words, as "Nature's Nation."<sup>11</sup>

Nearly a third of Nature's Nation is under the jurisdiction and management of the federal government. The public lands are what remain in public hands of the 2.3 billion acres of the North American Continent originally inhabited, controlled, and managed by Native American nations.<sup>12</sup> The federal government now owns some 662 million acres, 29% of the total area of the United States and one half of the land in the 11 Western states.<sup>13</sup> These lands are managed by five federal agencies, four within the United States Department of the Interior,<sup>14</sup> and the Forest Service in the United States Department of Agriculture.<sup>15</sup>

## III. PUBLIC LAND LAW

Far more than in most legal fields, the historical development of public land law is of pragmatic, modern significance. Public land law has been a study in conflict over the possession, allocation, and use of the lands and resources since the beginning of the nation. The conflicts of today are inherited from the past; indeed, most are replays of similar clashes in earlier times. Each of the federal land management agencies has a different history, organizational culture, constituents, and political pressure points. The

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9. Robert Bunting, *Introduction, The West and Its Forests*, 38 J. OF THE WEST 5 (Vol. 4 1999).

10. *Id.*

11. *Id.*

12. COGGINS, WILKINSON & LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 12 (3d. ed. 1993).

13. *Id.*

14. The Interior Department agencies are the Bureau of Land Management (BLM) which manages 264 million acres of surface lands and 570 million acres of subsurface mineral estate, the Fish and Wildlife Service (FWS) which administers wildlife refuges, the National Park Service (NPS) which oversees national parks, monuments, battlefields, and historic sites, and the Bureau of Reclamation (BOR), which controls lands around dams and water projects. See U.S. DEPT. OF THE INTERIOR, *PUB. LAND STATISTICS* (2000). The Department of Defense (DOD) also has considerable real estate under its control, some of which is available for natural resource use. However, DOD lands are beyond the purview of this article.

15. The Forest Service manages over 190 million acres of national forest and grasslands. <<http://www.fs.fed.us/aboutus/meetfs.shtml>> (last modified June 5, 2002).

laws these agencies implement express concepts of property, management, and the value of public land resources that have changed over time. These laws permit incompatible uses to occur on the same land areas, and often rely on difficult-to-administer management standards such as "multiple use" and "prevention of unnecessary and undue degradation."

The American people are divided about the appropriate uses of the public lands as well. They have been since the mid-1800s. Private interests demand access to the public lands to extract resources for economic return. People in communities all across the West know the lands as their backyard and want continued use of and benefits from them. Members of the broader public, often removed from the lands, value them for non-commodity resources, including increasingly limited wildlife habitat, undisturbed representational ecosystems, solitude, wilderness, and beauty. Native Americans rely on public lands for sacred spaces, and critical cultural materials.

#### IV. GENESIS OF THE PUBLIC DOMAIN

All of the land on the North American continent was once inhabited by Native American nations. European explorers "discovered" an occupied land. Native American cultures on this continent developed over the millennia. Native nations devised sophisticated patterns of land use and resource management and developed a network of coast-to-coast trade and transportation. They created governments, upon which our government was partly modeled. They built villages, towns, and cities. Cahokia in Southern Illinois was a city of 40,000 - a contemporary equivalent of Paris or London.<sup>16</sup> Europeans invaded and displaced a resident population, now estimated to have been greater than 12 million.<sup>17</sup>

Before America was tamed or settled, it was invaded and conquered. In *Johnson v. M'Intosh*,<sup>18</sup> Chief Justice Marshall legitimized this conquest through the doctrine of "discovery," which recognized aboriginal use and occupancy rights, but established title to the lands of the new world in the European conqueror, and subsequently, the United States.<sup>19</sup>

From the beginning of the European incursion in the late 1500s, one of the primary approaches to settling the North American continent was through land grants to entrepreneurs bold enough to take on the challenge of taming the wilderness and fending off the native inhabitants. The crowned heads of Europe, particularly of Great Britain, chartered proprie-

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16. RICHARD W. BEHAN, *PLUNDERED PROMISE: CAPITALISM, POLITICS, AND THE FATE OF THE FEDERAL LANDS* 45 (2001).

17. M. ANNETTE JAIMES ET AL., *THE STATE OF NATIVE AMERICA* 27 (1992).

18. 21 U.S. 543 (1823).

19. *Id.*

tors to establish colonies in the new world.<sup>20</sup> In some instances, the land grants stretched from "sea to sea."<sup>21</sup> The sovereigns did not send armies to capture and hold the land. They sent businessmen to do it - proprietors who reaped the profits from the exploitation of the lands and their resources.

The land grant legacy had a lasting impact. A major obstacle to ratification of the Articles of Confederation was the disparity in western land claims among the newly confederated states. Seven of the original 13 colonies had western land claims; six did not. Maryland and five other states with no land claims felt at a distinct competitive disadvantage without lands to sell for revenue or political gain.<sup>22</sup> These states refused to ratify the Articles of Confederation until the Continental Congress asked the states with western land claims to cede them to the Confederation to be held for the benefit of all and as a source for new states. Only when all the states agreed were the Articles of Confederation ratified.<sup>23</sup>

The cessions created the first public domain of the United States, more than 237 million acres, and radically altered our form of government.<sup>24</sup> What had been envisioned by the Founding Fathers as a small central government with limited powers became the sovereign and proprietor of a significant land base.

In 1787, Congress enacted the Northwest Ordinance to provide a way to create new states out of this public domain. It was not at all clear at the time that the Congress had the authority to do this. The need to resolve the question prompted the inclusion of the Property Clause of Article IV in the Constitution.<sup>25</sup> The Property Clause gives Congress the "power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States."<sup>26</sup>

With the Louisiana Purchase in 1803, the new republic grew rapidly. By 1853, the United States had acquired 781 million acres through various land purchases and treaties with European governments. Six hundred and thirteen million of these acres became the public domain.<sup>27</sup>

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20. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 1-48 (1968); James Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 244, n.17 (1994).

21. GATES, *supra* note 20, at 49.

22. *Id.* at 50-51; Huffman, *supra* note 20, at 246-47.

23. GATES, *supra* note 20, at 51-52.

24. *Id.* at 55-56.

25. *Id.* at 73.

26. U.S. CONST. art. IV, § 3, cl. 2.

27. For a detailed account of the various land acquisitions, see BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 14-23 (1965); GATES, *supra* note 20, at 75-86.

## V. EARLY FEDERAL LAND POLICY

Federal land policy is often described as developing through four eras: Acquisition, Disposition, Retention, and Management.<sup>28</sup> This division is simplistic and obscures a complexity of policies and resource management arrangements.<sup>29</sup> Certainly the eras were concurrent and overlapping. For example, the federal government began to dispose of its lands before it had fully acquired the continent, and Congress enacted one of the principal disposition laws, the General Mining Law of 1872,<sup>30</sup> the same year it reserved Yellowstone Park.<sup>31</sup> However, the analytical framework does help identify the major policy themes that underlie the statutes and regulations governing public land management.

## A. Disposition

It is certain the Founding Fathers had no intention of creating a large central government with huge land holdings.<sup>32</sup> The goal of early federal land policy, as expressed in a number of statutes, beginning with the Land Ordinance of 1785,<sup>33</sup> was to transfer title from the federal domain to private parties as quickly as possible.<sup>34</sup> The purposes of disposition were multi-fold: to raise money to pay Revolutionary War debt, to secure the continent against European invaders and Native Americans, and to implement the Jeffersonian concept of the small agrarian farmer as model citizen. Land was capital for Manifest Destiny.<sup>35</sup>

In the 1700s and early 1800s, property was land and things. Real property, *i.e.* land, was the entire physical plot.<sup>36</sup> Property was not con-

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28. See generally COGGINS, WILKINSON & LESHY, *supra* note 12 at 44-141.

29. Leigh Raymond and Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to The "Shift-To-Retention" Thesis*, 39 NAT. RES. J. 649, 650-54 (1999). Professors Raymond and Fairfax dispute the four-era analysis, especially the shift from disposal to retention. They argue this evaluation is too simplistic and omits, conceals, and distorts significant ideas in public land law. According to Raymond and Fairfax, public land policy did not move from disposal to retention, but was fragmented, and left no single coherent vision.

30. 30 U.S.C.A. § 22 (2002).

31. Act of March 1, 1872, 16 U.S.C.A. § 21.

32. Huffman, *supra* note 20, at 248; Marla E. Mansfield, *When "Private Rights" Meet "Public Rights": The Problems of Labeling and Regulatory Takings*, 65 U. Colo. L. Rev. 193, 196-97 (1994).

33. Ordinance of May 20, 1785, 28 J. CONTINENTAL CONGRESS 375 (Fitzpatrick ed. 1933).

34. Gary D. Libecap, *Bureaucratic Issues and Governmental Concerns: A Review of The History of Federal Land Ownership and Management*, 15 HARV. J. LAW & PUB. POL. 467, 469 (1992). There is a good deal of literature about the disposition policy. See, *e.g.*, GATES, *supra* note 20, at 247-50; HIBBARD, *supra* note 27, at 136, 138-39; COGGINS ET AL., *supra* note 12, at 55-106.

35. GATES, *supra* note 20, at 765. See also Frederick Jackson Turner, *The Significance of the Frontier in American History*, in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1893 at 199 (1894).

36. Raymond & Fairfax, *supra* note 29, at 692.

ceived of as a "bundle of sticks" (to use the metaphor that bedevils first year law students) that can be separated into various uses. For example, land was not divided into surface and sub-surface estates, as was done subsequently in the Stock-Raising Homestead Act of 1916.<sup>37</sup> Nor was the allocation of use rights a generally understood concept. The government's policy of disposition was to move property completely into private ownership.<sup>38</sup>

John Locke provided the philosophical underpinning for some of the most important disposition laws.<sup>39</sup> According to Locke, property ownership is a pre-political right, one that exists outside of government, and which must be respected by government in order for government to be legitimate. No government action is required to create property rights.<sup>40</sup> This idea that everything not owned in nature is free to be appropriated by a human actor was the central idea behind early land law. By individual effort a person can acquire property rights. Once property rights are established, the freedom to use property as the individual sees fit is an essential aspect of ownership.<sup>41</sup>

### 1. *Grants to Individuals*

One of the principal methods of disposition was the transfer of title to individuals upon a showing land had been put to productive use.<sup>42</sup> The Homestead Act of 1862,<sup>43</sup> for example, divided federal lands into 160-acre plots, and made them available to bona fide settlers. The fine hand of Locke is visible in the Homestead Act. By work and sweat an individual could end up as a property owner - the Jeffersonian ideal of the "hardy yeoman."<sup>44</sup> This concept of the rugged individual taming the wilderness to create the basic unit of democracy is one of our most compelling and enduring ideas. In the rhetoric of the Wise Use movement we still see the concept of an intrinsic right to property ownership resulting from individual

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37. 43 U.S.C.A. §§ 291-302 (repealed 1976, except for § 299 which reserves to the United States all coal and other deposits in lands entered and patented under the Act.)

38. Raymond & Fairfax, *supra* note 29, at 683-94.

39. See, e.g., Raymond & Fairfax, *supra* note 29, at 663, 684-86; GATES, *supra* note 20, at 3; or WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 35 (1977). The reader will forgive me for not citing directly to Locke's own work. However, these commentators have provided a good explanation of the influence of Locke on public land law.

40. Raymond & Fairfax, *supra* note 29, at 684-86.

41. *Id.* at 683.

42. Huffman, *supra* note 20, at 248-49; COGGINS ET AL., *supra* note 12, at 79-86.

43. U.S.C.A. §§161-164 (1862) (repealed 1976).

44. Raymond & Fairfax, *supra* note 29, at 663-64.



effort and land use.<sup>45</sup>

In reality, what the federal government wanted to do was sell the public domain to raise revenue, an expectation that was never met.<sup>46</sup> Settlers did not wait patiently in the East for the federal government to organize land sales. They swarmed out over the Western lands and simply took up residence. It was impossible to stop these squatters or to obtain payment from them, so Congress decided to legitimize the practice in the Homestead Act.<sup>47</sup> The landless squatter was thereby transformed into the hardy yeoman farmer, which has a much nicer ring.

Unfortunately, the Homestead Act, and other legislation like it, were based on congressional ignorance of the actual circumstances of the public lands.<sup>48</sup> Rather than creating positive social policy and direction, Congress was "caught in a cycle of always mistakenly applying the lessons of the past to new and different problems in the present."<sup>49</sup> The Homestead Act's allocation scheme, for example, was based on the farming experience of the green and humid lands of the East. It would have worked well in the mid-west, but most of the good farmland there was in private hands by the mid-1800s, before the statute was enacted.<sup>50</sup> Beyond the 100th meridian, where the mass of settlers was headed, lay the Great American Desert. Only a one-armed Army Captain named John Wesley Powell seemed to understand that rain would not necessarily follow the plough.<sup>51</sup> In his 1879 report to the Congress on *The Arid Regions of the United States, with a More Detailed Account of the Lands of Utah*, Powell observed that only part of the land in the West was arable under any circumstances and only a fraction of that could be irrigated with the limited quantity of water available. He pointed out that an irrigated farm of 160 acres was too large for a single farm family to manage, while a ranch of that size was too small. Powell suggested that Western communities hold pasture land in common and form cooperative irrigation districts to allocate scarce water resources in an equitable manner.<sup>52</sup>

No one in Congress wanted to hear Powell's account of the reality of

45. *Id.*, at 685-86.

46. ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 9 (1995).

47. GATES, *supra* note 20, at 67-68.

48. NELSON, *supra* note 46, at 3.

49. *Id.* at 34.

50. *Id.* at 16-17.

51. WALLACE STEGNER, BEYOND THE 100TH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST (1992). See also DYAN ZASLOWSKY & T.H. WATKINS, THESE AMERICAN LANDS 111-17 (1994).

52. NELSON, *supra* note 46, at 17-18.

the West and his "limits to growth" message. His report was ignored, and the settlement and exploitation of the public domain continued at an alarming rate, and with alarming environmental and social consequences.<sup>53</sup>

## 2. Grants to States

A second form of disposition was the transfer of land to the states as they were created. The expectation was that states would sell the lands to private parties to raise revenues for public activities such as schools.<sup>54</sup> The Northwest Ordinance of 1787 reserved a number of sections in every township as "school lands."<sup>55</sup> Title in these lands did not vest in the state until completion of the survey. Prior to that time, the federal government was free to dispose of the designated sections to private parties. If disposal occurred, the states had the right to make *in lieu* selections of school lands.<sup>56</sup>

Conflicts over *in lieu* rights have generated considerable modern litigation.<sup>57</sup> More than two hundred years after the Ordinance of 1787, the states are still arguing about the disposition of lands.<sup>58</sup>

Western states have felt from the beginning that they were not on an "equal footing" with the original states because they did not receive all the land within their territories at statehood.<sup>59</sup> They forget that the Eastern states were made to give up their land claims. The Eastern states complained just as loudly when Congress handed over huge acreages to newly created Western states. They too argued they were not on equal footing.<sup>60</sup>

The "equal footing" doctrine of the Constitution, which the courts have consistently held means that all states have equal legal rights and privileges, not equal land,<sup>61</sup> became the rallying cry for the Sagebrush Rebellion, as well as the Privatization, Wise Use, and County Supremacy movements, respectively. Yet all of these efforts to promote the turn-over of federal land to the states have failed, or are failing, as Western states realize what would be involved if they did, in fact, own federal lands, and had to manage

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53. ZASLOWSKY, *supra* note 51, at 125.

54. Huffman, *supra* note 20, at 249.

55. 1 Stat. 50 (1787).

56. See *Utah v. Kleppe*, 586 F.2d 756, 758-59 (10th Cir. 1978) *rev'd by* *Andrus v. Utah*, 446 U.S. 500 (1980).

57. DENNIS DRAGOO, *The Impact of the Federal Land Policy and Management Act Upon Statehood Grants and Indemnity Land Selections*, 21 ARIZ. L. REV. 395 (1979).

58. See, e.g., *Andrus v. Utah*, *supra* note 56; *Oregon v. BLM*, 876 F.2d 1419 (9th Cir. 1989); *United States v. New Mexico*, 536 F. 2d 1324, 1326-27 (10th Cir. 1976).

59. R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* 97 (1993).

60. GATES, *supra* note 20, at 6-11.

61. *U.S. v. Gardner*, 107 F.3d.1314, 1318-19 (9th Cir. 1997); NELSON, *supra* note 46, at 176.

them without federal subsidies, county payments, and the other substantial economic benefits provided by federal government.<sup>62</sup>

Seen clearly, the argument about land ownership is really a shorthand for a more complicated argument about access and influence in the policy making arena.<sup>63</sup> It is less about title and more about control. It is regulation, especially environmental regulation, that rankles traditional public land users. Management was decoupled from ownership years ago.

### 3. *Grants to Railroads - The Checkerboard*

Grants to the railroads were a third, and perhaps the strangest, form of disposition. Beginning in 1835, 127 million acres in alternate, odd-numbered sections of land were directly granted to the railroads, and 48 million more indirectly given by grants to the states.<sup>64</sup> The federal government retained ownership of the even-numbered sections, creating a checkerboard ownership pattern across much of the West that exists today.

The federal government's motivation was understandable. Congress was anxious to develop a national transportation infrastructure. It wanted to move raw materials from the West to the East to be made into finished goods, which could then be shipped back to the growing markets of the West.<sup>65</sup> Proponents of the railroad grants claimed they would cost nothing because the government would earn more in revenue on its retained sections than if it sold all the land outright.

The railroad land give-away was staggering. In 1856, a total of 19 million acres were granted to the railroads for the construction of 8,647 miles of rail lines. In 1864, 4 million acres were given for 2,100 miles of rail line. The Northern Pacific grant of 47 million acres amounted to 23% of the land in North Dakota and 15% of the land in Montana - an area the size of Vermont, New Hampshire, and Connecticut.<sup>66</sup>

The result was predictable. The railroads became huge proprietors with vast land areas available for development. They were a corporate throwback to colonial proprietors, but with one major difference - they were not individuals. The transfer of public wealth to private hands could be more easily rationalized when public resources benefited Jefferson's hardy yeoman and our developing democracy. It was another matter when the yeoman assumed a corporate form and became immortal.<sup>67</sup>

62. NELSON, *supra* note 46, at 178-181; CAWLEY, *supra* note 59, at 124.

63. CAWLEY, *supra* note 59, at 5.

64. GATES, *supra* note 20, at 379.

65. NELSON, *supra* note 46, at 14.

66. *Id.* at 15; BEHAN, *supra* note 16, at 26.

67. NELSON, *supra* note 46, at 15; BEHAN, *supra* note 16, at 26.

Through all the various disposition laws, the federal government transferred more than 1.2 billion acres to private parties by 1890.<sup>68</sup> After the mid-1800s, there was a growing recognition that these disposition statutes did not work in the arid West. There was no legal way to acquire sufficient acreage for a viable agricultural or timber operation or other productive activity, so land fraud and abuse were rampant.<sup>69</sup> So was environmental damage, as settlers struggled to make a living in areas environmentally unsuited for farming or cattle. By 1886, for example, cattle had exceeded the carrying capacity of the Northern range. In the winter of 1886, three-fourths of the herds perished in a massive blizzard. "Cattle piled up like driftwood in all the fenced-in corners of the range."<sup>70</sup> Millions of acres of rangeland were ruined, much of which has never recovered.<sup>71</sup>

The disposition policy had substantial consequences, many of which are evident today in the debate about local control and collaborative processes. In the early days of our nation, the allocation of property rights in land, the predominant form of wealth in an agrarian society, affected the nature and functioning of the economy of the United States.<sup>72</sup> The policy fostered the idea that federal lands and their wealth could be had for the taking, with little or nothing given in exchange for the public resources lost or the environmental damage caused. It made inevitable the establishment of private rights in the public lands.<sup>73</sup>

### B. Retention

Public and congressional reaction to the fraud, misuse, and environmental damage of the public lands compelled a change in approach in law and policy, away from the outright disposition of land to its retention and management. A series of statutes passed in the late 1880s and early 1900s reserved areas of land for special purposes and withdrew others from general availability for disposition. These laws reflected a different philosophical base. Whereas many of the disposition statutes were Lockean in nature - providing opportunities for individuals to acquire fee title in "unclaimed" land through work and effort - the new approach looked to the federal government to provide expert, scientific management of public land resources.<sup>74</sup> Retention of government ownership was necessary to provide

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68. E. LOUISE PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSITION AND RESERVATION POLICIES 1900-1950* 8 (1951).

69. NELSON, *supra* note 46, at 19-23.

70. ZASLOWSKY, *supra* note 51, at 117.

71. *Id.*

72. Libecap, *supra* note 34, at 470.

73. Huffman, *supra* note 20, at 276.

74. Raymond & Fairfax, *supra* note 29, at 710-11.

for efficiency, foresight, and planning.

The chief proponents of retention were conservationists and the Progressives, including President Theodore Roosevelt and Gifford Pinchot. Pinchot's goal was to bring European-style scientific forestry to the public lands. The purpose was absolutely not to protect the forest as an ecosystem or for its scenic beauty. Rather, Pinchot viewed his mission as using science as a better way to produce timber.<sup>75</sup>

Retention laws altered the legal and philosophical foundation of use of the public lands. The concept of property had been altered by this time as well. Property was no longer seen as the entire physical plot, but rather as a cluster of rights that could be separated and allocated to others.<sup>76</sup> Under the retention statutes, the federal government could, and did, make available public timber, forage, and minerals to citizens and corporations, while holding the land as a common property. Over time, as commodity users realized they still had access to public land resources without having title, actual ownership of the land base became increasingly irrelevant.<sup>77</sup>

### 1. *Park Reservations*

Public land reservations began in 1872 with the creation of Yellowstone National Park, which was set aside to preserve its natural wonders and provide a pleasuring ground for the public. Park reservation was a response to public dismay about the damage and desecration of natural wonders in the East. Places like Niagara Falls were in shambles - exploited and tawdry, and conservationists warned the public and members of Congress about the permanent loss of forests, wildlife, scenic vistas, and other important public resources.<sup>78</sup>

The idea of a national park was first expressed in print by George Catlin, the itinerant painter of Native Americans, who said, "What a beautiful and thrilling specimen for America to preserve and hold up to the view of her refined citizens and the world, in future ages! A nation's Park, containing man and beast, in all the wild and freshness of their nature's beauty."<sup>79</sup>

What Congress actually reserved at Yellowstone was much smaller than Catlin's vision of a Great Plains Park, and lacked human occupants. In keeping with the prevailing philosophical ideas of wilderness as an unin-

75. NELSON, *supra* note 46, at 48.

76. Raymond & Fairfax, *supra* note 29, at 682, 692.

77. *Id.* at 696.

78. GATES, *supra* note 20, at 28; Raymond & Fairfax, *supra* note 29, at 716.

79. George Catlin, *Letters and Notes on the Manners, Customs, and Conditions of North American Indians* 261-62 (Vol. 1, 1973), quoted in Ronald Weber, "I Would Ask No Other Monument to My Memory": George Catlin and a Nation's Park, 38 *J. OF THE WEST* 15 (Vol. 4 1999).

habited landscape, the Native American population of the area was removed when the Park was created.<sup>80</sup> The people who had been living in and managing the environment that captivated the American public and the Congress were forced to leave.

## 2. Forest Reservations

A more general policy of retention of public lands began with the General Revision Act of 1891.<sup>81</sup> The Act temporarily halted all public offering of land.<sup>82</sup> It repealed the Preemption and Timber Culture Acts, two of the most popular vehicles for patenting federal lands.<sup>83</sup> It slowed the transfer of title under the Homestead Act by extending the period between entry and the right to purchase from six to fourteen months, and it denied owners of more than 160 acres the right to make homestead entry.<sup>84</sup>

What keeps the General Revision Act from being a historical relic are its forest reserve provisions. The Act authorized the President of the United States to "set aside and reserve . . . any part of public lands wholly or partly covered with timber or undergrowth, whether of commercial value or not," as public reservations.<sup>85</sup> The Act was a response to the liquidation of the public forests of Michigan, Wisconsin, and Minnesota. Although these lands belonged to the federal government they were unprotected, and the lumber companies simply helped themselves. For example, from 1847 to 1897, timber companies in Michigan cut more than 160 billion board feet of white pine, leaving behind only 6 billion board feet in the entire state.<sup>86</sup>

The General Revision Act of 1891 did not explicitly provide for commercial activities in the forest reserves, and many reserve proponents wanted the forests to be preserved like parks.<sup>87</sup> Westerners generally were opposed to the removal of forests from commodity uses, and pressured Congress for a statute that would authorize management of the reserves for commercial purposes. Stockmen, who were largely barred from the forest reserves while they were under the jurisdiction of the Department of the Interior, bargained for greater access in return for supporting Pinchot's plan

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80. MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL & THE MAKING OF THE NATIONAL PARKS* (1999).

81. Libecap, *supra* note 34, at 471; General Revision Act, ch. 561, 26 Stat. 1095 (1891) (repealed 1976).

82. General Revision Act, *supra* note 81, at 1098, § 2290.

83. *Id.* at 1097.

84. *Id.* at 1098.

85. GATES, *supra* note 20, at 484.

86. ZASLOWSKY, *supra* note 51 at 66.

87. NELSON, *supra* note 46, at 45.

to move the reserves to the jurisdiction of the Department of Agriculture.<sup>88</sup> The Organic Administration Act of 1897<sup>89</sup> was a significant disappointment to the stockmen. This law authorized the Forest Service to regulate the use and occupancy of the national forests.<sup>90</sup> The Forest Service promptly issued regulations requiring grazing permits.<sup>91</sup> This was not at all what stockmen had in mind, and they challenged the constitutionality of the statute.

In *U.S. v. Grimaud*<sup>92</sup> and *Light v. United States*<sup>93</sup> the Supreme Court upheld both the constitutionality of the Forest Service Organic Act and the authority of the Forest Service to make rules and regulations to implement it. The Court rejected livestock owners' arguments that they had acquired rights to graze by using the lands before the establishment of the forest reserves.<sup>94</sup> The Supreme Court characterized their use as a privilege, an implied license that the government may revoke at any time and under any circumstances.<sup>95</sup>

Stockman Light, whose appeal to the Supreme Court was paid for by the Colorado legislature as well as the local stock growers association, also claimed the United States could not set aside a large tract of federal land without the consent of the state where it was located.<sup>96</sup> The Supreme Court held that, as sovereign and proprietor, the federal government had plenary power to decide the uses of the public lands. The federal government holds its lands in trust for *all* the people of the United States.<sup>97</sup> This ruling expresses one of the most basic principles of public land law. More recently, in *Kleppe v. New Mexico*,<sup>98</sup> the Supreme Court held that Article IV of the Constitution, the Property Clause, entrusts to the Congress unlimited power over the disposition and regulation of the public lands. Federal law pre-empts conflicting state or local law.<sup>99</sup> Congress may, and does, delegate the day-to-day management of the lands to agencies. However, as the federal

88. Raymond & Fairfax, *supra* note 29, at 731.

89. 16 U.S.C.A. §§ 473-76 *repealed by* Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2792 (hereinafter Forest Service Organic Act.)

90. *See* 16 U.S.C.A. § 551

91. Karl Anuda & Christopher Watson, *The Rise & Fall of Grazing Reform*, 32 LAND & WATER L. REV. 415, 420 (1997).

92. 220 U.S. 506 (1911).

93. 220 U.S. 523 (1911).

94. *Light*, 220 U.S. at 535; *Grimaud*, 220 U.S. at 514.

95. *Light*, 220 U.S. at 537-38; *Grimaud*, 220 U.S. at 523-24.

96. *Light*, 220 U.S. at 536.

97. *Id.* at 537 (emphasis added) (citing *United States v. Trinidad Coal Co.*, 137 U.S. 160, 170 (1890)).

98. 426 U.S. 529, 539 (1976).

99. *Id.* at 543.

district court held in *Nat'l Park Conservation Ass'n v. Stanton*,<sup>100</sup> agencies may not sub-delegate or give away their management responsibilities to state or local entities, either public or private.

Presidential forest reservations under the Forest Service Organic Act generated the same angry reaction as did President Clinton's designations of national monuments in 1996 and 2001 under the Antiquities Act of 1906.<sup>101</sup> Western delegations in Congress were so upset about President Harrison's and President Cleveland's forest reservations that they delayed their implementation for a year.<sup>102</sup> When Teddy Roosevelt added 85 reserves to the 41 existing at the end of the McKinley Administration, for a total of 150 million acres, Congress repealed the executive branch's power to establish forest reserves. It did so in a rider to a 1907 agriculture funding bill. Just before midnight on the last day before he would have to veto the bill, President Roosevelt proclaimed 21 more reserves, bringing the total to 195 million acres, and then signed the bill into law.<sup>103</sup>

The 1907 bill also stripped the Forest Service of a self-supporting fund made up of timber and grazing receipts. Western resentment of Gifford Pinchot led to congressional action to subject the Forest Service to the annual appropriation process.<sup>104</sup>

The General Revision Act was only the beginning of congressional expression of a retention policy. Subsequently, the government reserved coal and oil lands, power sites, and national parks and monuments. In most of these lands, however, minerals and other commodities were still available to private interests through leases and other arrangements with the federal government. For example, the Taylor Grazing Act (TGA)<sup>105</sup> withdrew 165 million acres of unpatented rangeland from the public domain,<sup>106</sup> but still spoke of retaining lands in federal management "pending final disposal."<sup>107</sup>

The Federal Land Policy and Management Act of 1976 (FLPMA)<sup>108</sup> signaled the formal end of disposition. Congress declared that "it is the policy of the United States that the public lands be retained in Federal ownership."<sup>109</sup> There was little opposition to FLPMA in 1976.<sup>110</sup> According to

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100. 54 F. Supp.2d 7, 21 (D.D.C. 1999).

101. 16 U.S.C.A. §§ 431-450ss-7.

102. ZASLOWSKY, *supra* note 51, at 68-69.

103. *Id.* at 74-75.

104. Raymond & Fairfax, *supra* note 29, at 731-32.

105. 43 U.S.C.A. §§ 315-315n.

106. PHILIP O. FOSS, *POLITICS AND GRASS* 4, 59 (1960).

107. 43 U.S.C.A. at § 315.

108. 43 U.S.C.A. §§ 1701-1784.

109. *Id.* at § 1701.



Richard Behan, "the users of federal lands had become hugely indifferent about ownership. You don't have to own land, they had discovered, to hijack the timber, forage, water, and minerals, to dump the external costs on society at large and to be subsidized in the process."<sup>111</sup>

#### VI. THE IMPACT OF OLD PUBLIC LAND POLICY ON CURRENT MANAGEMENT CONFLICTS

Charles Wilkinson has written that the "Lords of Yesterday" - the General Mining Law of 1872, the grazing laws, the prior appropriation doctrine of water law, the timber harvesting laws, and the water development laws - continue to rule Western resource management.<sup>112</sup> Professor James Huffman says the laws are not the lords.

The lords of the public lands are and always have been private interests [although] the pursuit of public land wealth by private interest will be a dominant factor in national politics. That is the way the game is played. Public lands are unavoidably political lands, and politics is inescapably about competing private interests. In the public lands debate, the rhetoric is about public rights, the reality is about private rights.<sup>113</sup>

Why is this so? Even under a policy of retention and management there has been little fundamental change in the underlying disposition policy of the public land laws since the late 1800s. The primary purpose of most of these laws is to facilitate private exploitation of public resources.<sup>114</sup> We are still giving away the nation's resources to those with the money and desire to exploit them. The federal land laws have made proprietors of timber companies, cattle operations, and multinational mineral corporations. Some of these laws, the prime examples being the General Mining Law of 1872 and the TGA, elevate mining and grazing to predominant uses by granting privileges and rights that constrain a land manager's authority to pursue other objectives. The multiple-use/sustained-yield directives of the National Forest Management Act and the FLPMA mandate production of commodities such as timber, minerals, and forage. The National Park Service Organic Act of 1916 directs the Park Service to provide pleasuring grounds for a burgeoning number of visitors while preserving the resources

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110. BEHAN, *supra* note 16, at 116.

111. *Id.*

112. CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN* (1992).

113. Huffman, *supra* note 20, at 276.

114. Raymond & Fairfax *supra* note 29, at 743. The authors note that, even in the Progressive Era, there was a "specific and increasingly emphatic commitment to continuing disposition." *Id.*

for which the Parks were established in the first place.<sup>115</sup> One need only sit in the bleachers on the pavement surrounding Old Faithful or visit the tree zoo that is Yosemite National Park to see the bind its governing statute imposes on the Park Service.

Congress has not altered the production mandates of the public land laws. Even when it provided the BLM with an organic law in FLPMA, Congress failed to set a clear policy directive for the agency - other than planning. It is no wonder that FLPMA has been called a "stand-off" between those who seek to exploit the public lands and those who wish to preserve them.<sup>116</sup>

The land managing agencies have become captives of the interests they regulate and often of their culture and academic training.<sup>117</sup> As a consequence, their management philosophy and practices often lag behind changes in the public's concept of the purpose and goals of the public lands in their care, and more importantly, far behind ecologically based management.<sup>118</sup> Even when the agencies try new management approaches that call for protection and restoration, as the Forest Service did under former Chief Mike Dombeck, the new direction is grafted clumsily on old legal structures.<sup>119</sup>

Although the laws have not changed, there has been a major shift in the public's attitude, expectation, and understanding about the environmental values of the public lands. Significant numbers of Americans all across the United States look to the public lands for non-commodity uses such as wilderness, wildlife habitat, solitude, and ecological sustainability.

So why have we reached the point where public lands are a three-way battleground, pitting land management agencies, local communities, and environmentalists against one another? Let me suggest some answers. The public land laws created privileges and permitted commodity uses that have

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115. 16 U.S.C.A. § 1a-1.

116. Mansfield, *supra* note 32, at 200.

117. BEHAN, *supra* note 16, at 145-47.

118. Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 318-321 (1994).

119. On November 9, 2000, the Forest Service issued proposed rules for land and resource management planning in the National Forest System. (65 Fed. Reg. 67514) The proposed regulations called for sustainability as the overall goal for national forest management, and made the maintenance and restoration of ecological sustainability a first priority for management. (*Id.* at 67517) While both the goal and priority indicated a new policy approach and a recognition of the non-commodity ecological values of forest lands, the rule stated that they must be achieved in accordance with the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531. As a result, they are tied to traditional forest management. A Forest Service rule review team in the Bush Administration subsequently concluded that the new regulations would be impossible to implement. Apparently, ecological sustainability is too far removed from the traditional management paradigm. See Karin P. Sheldon, *Great Move, But No Guarantee*, 18 THE ENVIRONMENTAL LAW INSTITUTE FORUM 67 (May/June 2001).

hardened into expectations, and claims of rights. As recently as the year 2000, the Supreme Court had to, once again, remind Western stockmen that grazing is a privilege, not a right.<sup>120</sup> Private interests have come to equate permission to exploit the resources of the public lands with ownership. With the advent of environmental regulations, they lost some freedom and control.

Furthermore, private interests are often captives of the myth of the lock-up of federal lands. The Public Land Law Review Commission "indelibly imprinted the notion that the federal government owns one third of the nation's land."<sup>121</sup> While this may be nominally correct, the land is hardly under federal lock and key. Leigh and Fairfax estimate that public resources are available for private exploitation and use on all but about ten percent of the federal estate.<sup>122</sup> Commodity users may be more constrained in their exploitation of public resources, but are in no way precluded from them.

A more fundamental issue, especially for small grazing and timber operators, is that their way of life is not sustainable. We will never again see the high levels of timber harvest, mining, or even cattle on the public lands that were characteristic of former times. For these resource users it is particularly galling that this message comes from outsiders - urban environmentalists, Eastern academics, and federal bureaucrats.

The environmental community looks with dismay at the environmental damage wrought by miners, grazers, and timber companies on the public lands. The extent and scale of the devastation, and the greed it represents, has bred a lack of trust in the motives and interests of commodity users and local communities.

The only common ground among these groups appears to be a mutual disregard for the land managing agencies, who are depicted either as having been taken over by environmentalists or as captive of the industries they are supposed to regulate. The agencies are routinely described as dysfunctional - with good reason. The current management seems to satisfy no one. In this context, the push for new experiments is entirely understandable.

To end the current impasse, we must face a new reality. The justification for public lands today is to protect values and services that the private market underserves or ignores.<sup>123</sup> Public lands are no longer principally valuable for timber, grazing, or minerals. They have a new and, in my

120. *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000).

121. Raymond & Fairfax, *supra* note 29, at 746 (citing PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND CONGRESS (1970)).

122. Raymond & Fairfax, *supra* note 29 at 746.

123. NELSON, *supra* note 46, at 211.

opinion, more important role as forest, prairie, wetland, mountain, scrub steppe, mesa, butte, haven, refuge, wilderness, sacred land. And they belong to all of us.

Pat Williams, former Montana Congressman and current Senior Fellow at the O'Connor Center for the Rocky Mountain West, said:

The war between the extractive industries and the environmental movement for the intermountain West is over. Gold and copper and silver and timber are no longer king. Their day is gone, not because of environmentalists, but because of price, productivity, and because we have exhausted the resources. The West is in another transition, going from one set of uses to another, and we are going to have to come up with different ways to manage the public lands.<sup>124</sup>

We have a great challenge. Can we figure out how to govern the public lands so these treasures are not wasted and take the necessary steps to restore the damage we have caused? Can we create institutions that are democratic and include *all* the relevant interests? Richard Behan contends that we lack the cultural history to create institutions to provide for common use, common enjoyment, and the sharing of a common habitat.<sup>125</sup> Our European ancestors with their Lockean notions could not comprehend an axiomatic feature of Native American cultures - the idea that land and all its uses should be held in common for the common good, with uses measured by their impact over seven generations. Instead, we directed our institutions of individual property rights and private wealth against the public lands and stripped them of their resources.<sup>126</sup>

That is our legacy. Collaborative processes may be one way to overcome it, but only if they are not just another way to grab public land resources and run. The goal and purpose of any collaborative effort must be true protection and restoration of the lands and their resources. The processes must make room for people who live near and derive their livelihoods from the public lands, but also those whose homes are far away.

## VII. CONCLUSION

I live in Vermont. I am not a Western local, and therefore, according to Dan Kemmis, I should have no say in how Western public lands are governed. Yet these lands are vitally important to me. I am a Westerner by

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124. Pat Williams, remarks at the Public Land & Resources Law Review Conference on *Public Land Governance: The Legal and Political Implications of National and Local Perspectives*, Missoula, Montana (April 12, 2002).

125. BEHAN, *supra* note 16, at 113.

126. *Id.* at 111.

birth. I grew up in Spokane, Washington, where my parents still live. The landscape that defines me and made me what I am is the ponderosa forest and dry butte country of eastern Washington. My parents, post-World War II settlers from Massachusetts, drove my brothers and me through the wide golden valleys of the Palouse and up and over the mountains of Idaho and Montana on hair-raising, twisted one-lane roads. We camped and hiked and wandered all over this wonderful country. Later, I spent years in Colorado and traveled southwest into New Mexico, Arizona, and Utah. I spent most of my pre-academic career litigating against the Forest Service and BLM for decisions that sacrificed public land and environmental values. One of my brothers has spent his career in range management for the BLM. We both work from the same motivations.

However, even if I was not a displaced Westerner, the public lands would be important to me, as they are to millions of Americans. The American people as a whole have a stake and a role in their protection and restoration. The West of today and tomorrow is a place of finite resources in an infinitely precious landscape. We must figure out how to value the lands and effectively manage the whole range of their resources. If we do not, in Richard Manning's chilling words, "this conjuring of the ghost forests will soon be all that remains"<sup>127</sup> Manning reminds us that our grandparents stuck a bargain with the public lands in pursuit of their wealth. If we follow through on this bargain, it shall become the ultimate measure of our poverty. Given this prospect, it seems time to face the consequences of what we have done and move in a new direction.

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127. RICHARD MANNING, *THE LAST STAND: LOGGING, JOURNALISM AND THE CASE FOR HUMILITY* 17 (1991).